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No. 99-536

IN THE
Supreme Court of the United States

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court for Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT I.

AN APPEALS COURT'S RECONSIDERATION OF "ALL OF THE EVIDENCE" IN DETERMINING WHETHER TO OVERTURN A JURY VERDICT RESULTS IN INACCURATE DECISION-MAKING. RECONSIDERING "ALL OF THE EVIDENCE" CAUSES THE APPEALS COURT TO DECIDE THE FACTS, NOT THE LAW.

The primary role of federal appellate courts is to decide issues of law. Instead, Respondent devotes 19 pages of its brief to its version of the *facts*. Approximately 18 of those pages present "facts" favoring Respondent, the movant on the motion for judgment as a matter of law. Such a view of the facts is inconsistent with the Seventh Amendment, under which the jury is supposed to be the fact finder. The correct fact finder -- the jury -- disbelieved the "facts" as stated by Respondent, and believed the contrary facts produced by Mr. Reeves.

Reconsidering "all of the evidence" allows judges to accept as true the very evidence which the jury disbelieved. The parties' dispute over who made the decision to terminate Mr. Reeves is one of many examples of this. On page one of Respondent's brief (hereinafter "R. Br."), Respondent states: "Reeves was terminated by Sandra Sanderson on October 23, 1995 ...". But the non-movant's evidence, which the jury accepted, was that Mr. Reeves was not terminated by Sandra Sanderson, but by the age-biased Chesnut. Tr. at 3, 4, 80, 81.

Page eleven, n. 15, brief of Respondent states the "facts" (which really means evidence favoring the movant) to be that "Reeves ... according to his own testimony, was

allowing Mitchell to be paid for periods of time when he was not working!" Mr. Reeves' testimony was just the opposite. Mr. Reeves swore that company officials "knew that his [Mitchell's] job was to come in [early] and get the machines ready." Tr. at 336.

Relying on "all of the evidence," Respondent claims Reeves was responsible for the monthly reports. R. Br., p. 6. But Mr. Reeves' testimony, accepted by the jury, was just the opposite.

> Q. What was your responsibility as far as these monthly reports go that you have heard all of the discussion about?
>
> A. I had no responsibility on them.
>
> Q. What was your responsibility as far as writing people up?
>
> A. Russell [Caldwell] did the writing up. I had no responsibility.

Tr. at 335.[1]

Considering "all of the evidence," Respondent claims that the age-biased Chesnut was not involved in the 1993

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[1] One had to have the monthly reports in order to give writeups. Only by examining the monthly reports would one know whether or not an employee had missed the allotted five percent of time per month.

probation decision. This is true, according to movant's evidence. Chesnut swore three times that he had no knowledge in 1993 about Reeves having been put on probation and "had nothing to do with that. Tr. at 217, 235. But then, on cross-examination, Chesnut was shown his own affidavit, which states: "In December 1993, Russell Caldwell, manager of the department, and at the recommendation of affiant [Chesnut] as Director of Quality Control ... plaintiff was placed on probation." Tr. at 237.

Respondent states, brief, p. 9 at n. 10: "... *Petitioner's own counsel has admitted that the errors committed by the 33-year-old Oswalt (as shown in Exhibit D-5) were almost identical to those committed by Petitioner and were sufficient to constitute termination!*" (emphasis in original) The transcript does not support this assertion.

> Q. [By Mr. Chandler – Petitioner's counsel] Then the other people who are listed as employees of the special line, I concede there are numerous violations. But that was not Mr. Reeves' department, was it?
>
> A. No, it was not.

Tr. at 294-295. This can in no way be construed as an admission that Mr. Reeves, rather than Oswalt, made such errors.

Citing all of the evidence, Respondent claims low productivity was a cause of Petitioner's termination. R. Br., p.

1.[2] But non-movant's evidence was that Mr. Reeves' production was outstanding, his efficiency was 60 units per man hour, compared to the company goal was only 48 units per man hour. Tr. at 16-17.

Emphasizing and even exaggerating the "movant's" evidence, Respondent says that Mr. Reeves never denied "he committed errors." R. Br., p. 23. But Mr. Reeves' evidence was just the opposite. Mr. Reeves emphatically denied any of the errors with which Chesnut charged him. Tr. at 71-73.[3]

Respondent claims the purported study showed "absenteeism." R. Br., pp. 8-10. The evidence, favoring the jury verdict, was just the opposite. The asserted study of hinge room absenteeism revealed that over a three month period the

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[2] This contradicts Respondent's position at trial. At trial, Respondent's counsel claimed that "production was not the reason." Tr. at 327.

[3] Reeves testified that when other workers have committed the types of errors that Chesnut alleges Reeves to have committed, they were corrected simply by adjusting an employee's paycheck and paying him any overpayments out of a subsequent paycheck. Tr. at 71-73. Besides misrepresenting the facts, a rule that "all of the facts" will be considered allows an appeals court to emphasize facts that a jury may well have found insignificant. For example, Respondent emphasizes the fact that the 45 year old Caldwell was also fired. Of course, a jury may have thought that this was also age discrimination, in view of the fact that Reeves was replaced by less-efficient employees in their thirties, and Caldwell may have been also.

35 employees on the regular line had been out sick a combined total of eleven days (an annual rate of 1.25 sick days per employee) and had taken a combined total of eight personal dates (an annual rate of .9 personal days per employee). J.A. at 21. Not surprisingly, there was no actual testimony that such a minuscule rate of absences would be "excessive."

Respondent asserts that its investigation identified repeated errors in the preparation of attendance records, but says almost nothing about the nature of those asserted mistakes. Cross-examination revealed that the asserted problem was of truly minuscule size. Respondent's witnesses conceded that almost all the asserted errors concerned the entry of a particular code on company time reports. Employees were expected to be at work from 7:00 a.m. until 3:00 p.m. During the period studied there were instances, occurring on average about once a day, in which the daily sheets prepared by petitioner recorded that the employee was present at 7:00 precisely. Respondent did not dispute that the workers were actually there; rather, it insisted that the employees were in fact required to arrive at work no later than 6:59 a.m.. Thus company officials testified that an employee who clocked in at the firm's time clock at 7:00 was technically *late* for work. Tr. at 119, 128, 241, 245, 246-47, 263. Supervisors, they insisted, were responsible not only for recording when workers were on the job, but also for placing an "01" code next to the entry of any tardy worker. Petitioner's asserted error was failing to place the "01" code next to each entry with a 7:00 starting time. Tr. at 140, 154, 205-06, 319. As vice president Jester testified, the report revealed instances "where someone punched in at seven o'clock and the supervisor didn't code it correctly . . . . That's what the whole case is about." (Tr. 324).

The testimony that these records were miscoded was squarely contradicted by petitioner, who testified both that the workers in question were in fact on the job before 7:00 and that Chesnut knew that that was the case.

> Q. How do you know that employees who were recorded as punching in at exactly seven o'clock were not late arriving at their work station?
>
> A. Because I was the one that started the line up. I was standing over there where I could see the line . . . I announced seven o'clock. Turn the line on. If there was anybody wouldn't have been at their station I would knew [sic] that they weren't at the station.
>
> Q. Was Mr. Chesnut aware of this practice?
>
> A. Yes, he was.

Tr. 335. Petitioner further explained that the entry "7:00" was made by hand on time records when, as regularly occurred, the factory's time clock failed to register when an employee punched in. Moreover, Chesnut testified that he was invariably present in the hinge room at 7:00 a.m., and so he would have had personal knowledge if there were in fact late arriving workers. Under these circumstances, the jury was plainly within its province in accepting petitioner's contention that the alleged problems with tardy employees were simply a cover to get rid of an unwanted older worker.

Thus, time and again, Respondent, purporting to rely on "all of the evidence," cites as the true "facts" of the case evidence or inferences which were contradicted by Mr. Reeves' evidence. A court rule permitting reconsideration of "all of the evidence" allows the jury verdict loser to exaggerate and emphasize the evidence favoring it and, thus, persuade an appeals court to accept as true evidence the jury did not believe.

Consideration of "all of the evidence" is inconsistent with this Court's precedents, since this Court has established that where there are conflicting accounts of the same circumstances, the trier of fact's decision as to which version to credit is conclusive. *Dunning v. Colley,* 281 U.S. 90, 94 (1930). "It is true that there was testimony tending to show a different state of facts ... But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court ...". *Richmond & Danville R.R. v. Powers*, 149 U.S. 43, 47 (1893). According to *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947):

> The choice of conflicting versions ..., the decision as to which witness was telling the truth ... are questions for the jury. Where uncertainty ... arises from a conflict in the testimony ... the question is not one of law but of fact to be settled by the jury.[4]

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[4] Examples of incorrect factual statements made by Respondent demonstrate that a court purportedly considering "all of the evidence," may actually overlook the facts the jury found. This Court has noted that appeals courts have

(continued...)

Besides allowing the court of appeals to accept as true evidence contradicted by non-movant's evidence, reconsideration of "all of the evidence" in the manner proposed by Respondent allows the appeals court to draw its own inferences instead of leaving this task to the jury.

The appeals court did not deny that the jury could reasonably have found that there was pretext. From the finding of pretext, there are two inferences that can be drawn – that Petitioner was fired because of an illegal discriminatory reason (age) or that he was fired for some other unspecified reason. By finding no age discrimination, the appeals court drew the inference (lack of discrimination) in favor of the moving party. But it is established that "the comparative weighing of conflicting evidence and inferences is a core jury responsibility." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "The very essence of the [the jury's] function is to select among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria P.U.R. Co.*, 321 U.S. 29, 35 (1944).

This limitation is illustrated by *Hunt v. Cromartie*, ___ U.S. ___, 119 S.Ct. 1545 (1999). The case turned in significant part on motives in adopting the redistricting plan under review.

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[4](...continued)
sometimes reversed jury verdicts by "overlooking" crucial evidence favoring the jury verdict winner. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 701 (1967); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962).

Much of the underlying data was itself not in dispute, and the parties had offered competing expert analyses which supported conflicting conclusions regarding the motives of the legislature which had adopted the plan. This Court held that the dispute over motive could not be resolved as a matter of law:

> Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivations finding or in favor of a political motivation finding or in favor of a political motivation finding. The District Court nevertheless concluded that race was the "predominant factor" in the drawing of the district. In doing so, it either credited [the moving party's] asserted inferences over those advanced and supported by [the nonmoving party] or did not give [the nonmoving party] the inference they were due. In any event, if was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage.

119 S.Ct. at 1552.

Contrary to the view of the court of appeals,[5] this

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[5] Commentators have noted a high rate of appellate reversal of jury verdicts, particularly in discrimination cases. *See*, Eric Schnapper, *Judges Against Juries: Appellate Review of Federal Jury Verdicts*, 1989 Wis. L. Rev. 237, 248-49 (1989). There appears not to be a single discrimination case
(continued...)

Court's precedents respect the Seventh Amendment and reject any idea that an appeals court has the authority to consider "all of the evidence," and to then rest on trial facts contradicted by non-movant's evidence. *Fowle v. Common Council of Alexandria*, 24 U.S. 320, 322 (1826):

> Indeed, the nature of the proceedings upon a demurrer to evidence, seems to have been totally misunderstood in the present case. It is no part of the object of such proceedings, to bring before the Court an investigation of the facts in dispute, or to weigh the force of testimony ... that is the proper province of the jury.

Contrary to the view that a court of appeals should weigh "all of the evidence," to determine whether the jury's verdict was "reasonable," the "established rule [is] that in passing upon whether there is sufficient evidence to submit an issue to the jury [the court] need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). The simple,

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[5](...continued)
since 1996, however, where a court of appeals has overturned a jury verdict in favor of a defendant for lack of evidence. Thus the fears of the anti-federalists that, without the Seventh Amendment, the judges would favor the "money class," has been realized through judicial decisions. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671-77.

correct rule is that rather than weighing "all of the evidence" in passing upon a peremptory instruction, the court may assume that the jury concluded that the non-movant's witnesses were lying and the non-movant's witnesses were telling the truth. *Ewing's Lessee v. Burnet*, 36 U.S. 41 (1837).

One of Respondent's amici claims that a court should not consider only non-movant's evidence because a hypothetical jury might disregard the testimony of 40 witnesses over a single discredited witness. Product Liability Advisory Counsel, Inc.'s brief, pp. 18-19. In this case, however, there are only three interested witnesses attempting to discredit Reeves' testimony. Even Amici's hypothetical would still have to be decided by a jury:

> If there is a conflict in direct testimony, it is clear that the jury must be allowed to determine which witnesses to believe, even if it chooses to believe a single witness of dubious credentials in preference to twenty witnesses of unasailed integrity ... The principle of minimum intrusion on the jury's function is thus easily sufficient to justify the jury's general freedom ... to credit the single witness".

Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 Minn. L. Rev., 903, 928-929 (1971). Of course, if a jury errs, the remedy is a motion for a new trial, subject to appellate review for an "abuse of discretion." *Gasperini v. Center for Humanities*, 518 U.S. 415, 436 (1996).

Respondent claims that it is entitled to judgment as a matter of law because Chesnut testified that the company *would* also have fired the 35 year old supervisor (Oswalt), who assertedly had made as many errors as Petitioner, if Oswalt had not quit earlier. This argument contravenes this Court's rule that the jury has the right to reject the testimony of an "interested witness." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408 (1899); *See also*, Cooper, *Directions for Directed Verdicts*, *supra* at 943:

> Likewise, in situations where a witness is called upon to testify to what would have been done if something else had not first occurred, the slope down into comfortable certainty that the favorable thing would have been done is so easy that a policy of free disbelief seems incontestible ... Examples could be multiplied; the point seems sufficiently made that there are many situations in which interested testimony may properly be rejected without other showing to support its rejection.

Respondent cites to *Whitley v. Albers*, 475 U.S. 312, 322 (1986), but this is not authority for a rule that all of the evidence should be considered. *Whitley v. Albers* never said that this Court was considering *all* of the evidence, or that this Court was resolving any conflict in the evidence in favor of the movant. Instead, this Court accepted as true the non-movant's expert testimony that prison officials had "obviously erred in judgment," and stated that a mere error in judgment "falls far short of a showing" there was an Eighth Amendment violation. 427 U.S. at 323. *Whitley v. Albers* does not address the issue of whether the court should consider all of the evidence or only

non-movant's evidence.

Parklane Hosiery Co. v. Shore's, 439 U.S. 322 (1979),[6] statement that the Seventh Amendment does not incorporate every "procedural detail" of the common law right to trial by jury does not apply to these facts. The rule that only the non-movant's evidence is to be considered is not a "procedural detail" of the common law. It is at the heart of the common law right to jury trial. If all of the evidence be considered, the right to jury trial is greatly diminished, since an appeals court, under the guise of considering "all of the evidence" may weigh the evidence, and disagree with a jury's fact finding.

Considering only the verdict winner's evidence is every bit as "essential" to the Seventh Amendment as is the rule that only the jury, not an appeals court, can retry the facts, so as to reduce the damages, a principle that this Court affirmed as recently as *Hetzel v. Prince William County*, 523 U.S. 208, 118 S.Ct. 1210, 1211 (1998).

Nor may Respondent take solace from the three 1986 cases approving grants of summary judgments. These cases cannot be counted as infringements upon the Seventh Amendment's Re-Examination Clause since, by definition, no jury has been empaneled when a summary judgment is granted. All these cases support the position that only non-movant's and

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[6] In fact, *Parklane Hoisery Co.* supports Petitioner because its result was based on the Seventh Amendment by stating that "at common law a litigant was not entitled to have a jury determine issues that had been previously adjudicated by the chancellor.

the uncontradicted, unimpeached evidence of movant is to be considered. *See Matsushiti Elect. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (Lower court is to search the record for evidence that might "permit a trier of fact to find the petitioners conspired to [set prices] despite the absence of any apparent motive to do so"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return the verdict for that party); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (Summary judgment is proper if non-moving party fails to produce evidence "sufficient to establish the existence of an element essential to that party's case ...").[7]

[7] The courts of appeals have sometimes construed these cases to deny jury trials in the face of factual disputes. *See* Ann C. McGinley, *Credulous Courts and the Tortuous Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 207 (1993) (Lower courts have granted summary judgment in cases where there exist questions of fact concerning the employer's motive, thereby denying employment discrimination plaintiffs their "day in court" historically promised by the American Model of Litigation.

REPLY ARGUMENT II.

THE COURT OF APPEALS MAY NOT BE AFFIRMED ON THE THEORY EITHER THAT THE CASE INVOLVES ONLY THE "BUSINESS JUDGMENT" OF THE RESPONDENT, OR THAT AGE-BIASED REMARKS ARE INSUFFICIENT TO PROVE DISCRIMINATION.

Respondent argues that the court of appeals must be affirmed since the jury may not substitute its opinion of correct business judgment for that of the employer. R. Br., pp. 23-24. In order to determine whether there was pretext for discrimination, however, the jury must examine the proffered explanations to decide whether they are true or whether they are an excuse for discrimination. A jury must determine whether there actually were any rational business reasons for the decision,[8] or whether the purported business reasons are a lie concocted to cover up discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), determined that one method of proving discrimination was to show that the employer's proffered explanation (i.e., his business reasons) is unworthy of belief. Likewise, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973), held that

[8] The District Judge specifically told the jury that it could not substitute its business judgment for that of Respondent, Jury Charge, p. 8, and also told the jury it could not find for Petitioner unless it found the Respondent's reasons for the decision were a pretext for age discrimination. Jury Charge, p. 8. Petitioner has requested the District Court Clerk forward the jury charge to this Court as a supplemental record.

the fact finder was entitled to examine the defendant's business practices to see if "white employees were treated better than plaintiff," since this would be "especially relevant to prove discrimination."

The court of appeals should not be upheld on the grounds that "stray remarks" are not evidence of discrimination. True, many courts of appeals have branded apparently discriminatory statements as "stray remarks," and not as evidence of a discriminatory employment decision. Many other authorities disagree, however, even in the Fifth Circuit.[9]

The cases permitting a jury to decide the issue of whether such statements are evidence of discrimination must be correct since the "very essence of the [jury's] function is to select from among conflicting inferences ... that which it considers most reasonable." *Tennant v. Peoria P.U.R. Co.*, 321 U.S. 29, 35 (1944); *Anderson v. Bessermer City*, 470 U.S. 564, 574-575 (1985).

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[9] *See Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996); *Smith v. Berry Co.*, 165 F.3d 390, 394 (5th Cir. 1999); *Ray v. Iuka Municipal Sep. School Dist.*, 51 F.3d 1246, 1250 (5th Cir. 1995); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1094 (5th Cir. 1994); *Portis v. First National Bank of New Albany, Mississippi*, 34 F.3d 325, 329 (5th Cir. 1994); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 733 (5th Cir. 1999); *Sischo-Nownejad v. Merced Comm. College Dist.*, 934 F.2d 1104, 1112 (9th Cir. 1991); Johnson *v. Minnesota Historical Soc.*, 931 F.2d 1239, 1244 (8th Cir. 1991).

Respondent insists that the jury could not reasonably have inferred that Chesnut still harbored such age-based animus when petitioner was dismissed because his remarks were too "remote in time" R.Br. 24. On its view, an inference of animus at the time of the October 1995 dismissal required proof of "contemporaneous" biased remarks (R.Br.25), even though Chesnut's remarks were made within two months of petitioner's dismissal. But in both civil and criminal litigation, prior expressions of attitudes or emotions have long been regarded as probative evidence to explain later actions. 2 Wigmore on Evidence, §§ 395-406 (1940). If a jury concluded that a supervisor in August 1995, or August 1994, harbored ill-will towards older, female, or minority workers, it could reasonably infer that the supervisor still adhered to those views in October 1995. Individuals who entertained prejudices at one point in their lives can, and at times happily do, change their attitudes; others, regrettably, do not. Nothing in federal law requires a trier of fact to assume that such attitudes expressed at an earlier date have--or have not--dissipated with the passage of time. That question is for the trier of fact.

Respondent's claim that discriminatory remarks are not "evidence" of discriminatory discharge even contradicts a federal rule of evidence. Federal Rule of Evidence 401 says that "relevant evidence means evidence having any tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence." Obviously, it is "more probable" that one who has said that Petitioner is "too damn old for the job" fired him because of his age than would be the case if such evidence did not exist.

Some courts have recognized the fallacy of an arbitrary rule forbidding consideration of such remarks:

> [The defendant] would have this court hold that discriminatory remarks are tied to the decisional process only if a decisionmaker said something to the effect of "I'm firing you because you are too old." Few employers who engage in illegal discrimination, however, express their discriminatory tendencies in such a direct fashion ...".

EEOC v. Pape Lift Co., 115 F.3d 676, 684 (9th Cir. 1997). The existence of a supervisor's animus toward older, minority, or female workers does not compel the conclusion that a disputed employment decision was motivated by that bias, but it assuredly would support such an inference. A contemporaneous statement of animus "directly related" to a disputed decision (e.g., "Let's fire Reeves, he's old") would be *direct* evidence of discrimination, and would shift to the employer the burden of proving that it would have taken the same action regardless of Petitioner's age. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). But less conclusive evidence is sufficient to support, although it would not compel, a finding of discrimination. In each case, it is up to the jury to weigh all of the evidence and decide whether the remarks were too vague, too distant, or counterbalanced by other evidence to support a claim of discrimination. That is what the jury did here, and the court of appeals and Respondent are in error in their claim that Chesnut's remarks are irrelevant.

Holding that a jury may find discrimination where a member of the disfavored class is replaced by a member of the favored class and the only reasons the employer gives are lies is consistent with this Court's precedents, and respects the right to a jury trial. On one point, Petitioner and Respondent agree.

We agree that a verdict may be rendered for Petitioner only if he proves that he was fired because of his age. The parties differ over who is to make that decision.[10] Mr. Reeves believes that a jury should be allowed to infer discriminatory intent where an employer fires a more efficient worker and replaces him with a younger, less-efficient worker, and where the only reasons given for the decisions are discredited. "When a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (1989) (O'Connor, J., concurring).

CONCLUSION

Respondent asks this Court to adopt a practice, which it characterizes as a plan for judicial review of "of all the evidence" that supplants juries as finders of fact under the Seventh Amendment. Thus, Respondent proposes that the preeminent responsibility for assessing the sufficiency of the evidence at a jury trial belongs to federal appellate judges. Respondent suggests that the appellate courts, including this Court, should conduct a *de novo* assessment of the evidence without any regard to the conclusion reached by the district judge, who was present throughout the trial, that the jury's findings were supported by the record.

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[10] District Judge Senter told the jury the Petitioner had to prove the Respondent's reasons were a pretext for age discrimination. Jury Charge, p. 8. Petitioner's counsel has requested the district clerk to send this jury charge to this Court, as a supplemental record.

Respondent misapprehends the respective roles of trial and appellate judges in the federal judicial system. The expertise of appellate judges is the resolution of legal issues. Their special expertise does not lie in examining such mundane matters as the workday occurrences at a toilet seat factory. Appellate judges who attempt such a task, in view of their limited time, often will make crucial mistakes as to the facts, as they did in this case. Thus, "de novo all of the evidence review" urged upon the Court by the Respondent wastes precious judicial resources, while causing a less accurate result.

The jury verdict should be reinstated.

Respectfully submitted,

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